

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 2028/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

KTS GENERAL TRADERS CC

APPLICANT

AND

MAPHETO BUSINESS SERVICES CC

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The respondent has instituted action against the applicant. On 17th April 2017 summons were served at the applicant's business place on Mr Lucas

Thobakgale an employee of the applicant. The applicant failed to enter notice of appearance to defend. The respondent proceeded to apply for a default judgment and served the notice of set down of the default judgment on 1st December 2017 on France Thobakgale an employee of the applicant. The application for default judgment was set down for the 18th February 2018. The applicant failed to attend court and the respondent obtained a default judgment against applicant.

- [2] The respondent proceeded to issue a writ of execution. On 4th June 2018 the sheriff of court visited the applicant's premises and attached some of the movable assets and placed them under judicial attachment. The applicant alleges that it became aware on 4th June 2018 that a default judgment has been taken against it.
- [3] The applicant avers that on receipt of the writ of execution, it handed it to his attorney Mr Coetzer with the purpose of bringing the application for rescission of judgement as his administrative staff did not bring the summons and set down of the default judgment to its attention. It also wanted Mr Coetzer to bring a counterclaim against the respondent. Mr Coetzer could not immediately prepare the papers for rescission as he was still waiting for information with regard to the counterclaim from its (applicant) staff members. Its staff members did not provide Mr Coetzer with the required information and also failed to inform it (applicant) that they did not comply with its request. The applicant also failed to follow up with Mr Coetzer regarding the progress of the rescission application. It only realised during the second week of September 2019 that the application for rescission was never brought. That is

when it took the necessary information to Mr Coetzer to initiate the rescission application.

- [4] The applicant has now brought a rescission application and also condonation application for late filing of its rescission application. The rescission application is brought in terms of Rule 31(2) (b) of the Uniform Rules of Court (the Rules). The respondent is opposing the applicant's application. The applicant avers that the application was brought out of the prescribed time period as a result of an oversight from its office.
- [5] With regard to the *bona fide* defence, the applicant avers that the respondent has partially completed the work as set out in his appointment letter and thereafter abandoned the balance of the work. It is the applicant's contention that the respondent was not entitled to any payment as the work was not completed. The applicant further avers that the respondent has rented its TLB at the rate of R3600-00 per day and has refused to return it. According to the applicant, the current value of the TLB is R1 million, and the outstanding rental payment for the TLB for 33 days amounted to R118 800-00. It is therefore the applicant's contention that it is having a counterclaim against the respondent that is exceeding the amount that the respondent is claiming.
- [6] The respondent in its answering affidavit has raised two points *in limine* which it did not pursue when the application was argued. In relation to the applicant's condonation application, the respondent argued that the applicant became aware of the default judgment on 4th June 2018, but has failed to reveal the reason why it was under the impression that Coetzer & de Beer were bringing an application for rescission. It is the respondent's contention that the applicant has failed to attach the confirmatory affidavit by the

administrative staff who had failed to give Coetzer & de Beer the necessary information.

[7] With regard to the merits of the application, the respondent argued that the applicant has failed to give details of the work that was allegedly unsatisfactory. It is the respondent's contention that the work that was done by the respondent was approved by the Municipality and further that the Municipality had paid the applicant in full for the completed task. With regard to the alleged rental of the TLB, the respondent submitted that the applicant has failed to attach the lease agreement, and that if indeed the respondent owed it, the applicant would not have waited for over three years without making a move to repossess the TLB or demand payment for outstanding rental.

[8] The applicant has brought its rescission application in terms of Rule 31(2)(b) which read as follows:

"A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

[9] The applicant became aware of the default judgment on 4th June 2018 when the sheriff of the court made judicial attachment. The applicant launched its rescission application on the 4th October 2019 out of the stipulated 20 days period. The applicant has therefore also brought a condonation application for the late filing of its rescission application.

[10] It is trite that the factors that the court must consider in exercising its discretion to grant condonation includes the degree of lateness; explanation for the delay; prospects of success; degree of non-compliance with the rules;

the importance of the case; the respondent's interest in finality of the judgment; convenience of the court and the avoidance of unnecessary delay in the administration of justice. **(See Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others¹)**

[11] The applicant brought its rescission application 16 months after it became aware of the default judgment. In my view, the applicant's application is extremely late. A strong explanation can cure the excessive lateness.

[12] In its explanation for the delay, the applicant blames its administrative staff who failed to give Mr Coetzer information about the counterclaim it wanted to bring against the respondent. The applicant further alleges that it was under the impression that the rescission application has been brought. There is a lack of information about where this alleged impression was based. Firstly, the applicant has failed to disclose the name of the alleged administrative staff who was supposed to give information to Mr Coetzer. Secondly, for a rescission application to be activated, a founding affidavit must be signed. If the applicant was under the impression that the rescission application has been brought, it has failed to disclose the name of the person who had signed or was supposed to sign the founding affidavit of the rescission application and when it was allegedly signed. Thirdly, the applicant in its founding affidavit alleges that Mr Coetzer was waiting for information with regard to the counterclaim. Mr Coetzer is a legal person who knows the time frames within which the application should be made. The confirmatory affidavit of Mr Coetzer does not deal with the issue as to what he did when he realised that the time period within which to make a rescission was about to expire. Fourthly, the applicant has failed to attach a confirmatory affidavit of the

¹ [2013] 2 All 251 (SCA) at para 11

administrative staff to conform its version. Fifthly, the applicant merely alleges that it realised during the second week of September 2019 that the rescission application was never brought. However, the applicant does not state the circumstances that made it to realise that the application was never brought.

[13] In **Uitenhage Transitional Local Council v SA Revenue Services**² Hefer JA said:

“...condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

[14] The applicant's explanation for the delay is very scanty as it lacks full details and accurate account of what exactly happened between the period 4th June 2018 and 4th October 2019. Counsel for the applicant before this court correctly conceded that full details were not given in the applicant's founding affidavit. In my view, the applicant's explanation for delay is unsatisfactory.

[15] With regard to the prospects of successes, the applicant had merely stated that the respondent did not complete the work to its satisfaction and therefore cannot claim payment. The respondent in its answering affidavit has denied this allegation and stated that the task was completed and the Municipality had approved the work it had done, and had also paid the applicant in full for the task completed. The applicant did not file a replying affidavit to refute these allegations and they therefore remained unchallenged. If indeed the Municipality had certified the work done by the respondent to be satisfactory,

² 2004 (1) SA 292 (SCA) at para I-J

and had also paid the applicant in full for the task that the respondent had completed, what is the reason for withholding the respondent's payment? Those reasons must be clearly spelt out in order to enlighten the court. However, the applicant has failed to do so. Since the respondent's version was not challenged, that makes the applicant's prospect of success to be weak, if not non-existence.

[16] In my view, the applicant has failed to meet the requirements for the granting of condonation. The applicant's condonation application therefore stands to fail. There will therefore be no need to deal with the merits of the rescission application.

[17] In the results I make the following order:

17.1 The applicant's condonation application is dismissed with costs on party and party scale.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : ADV JP MORTON

INSTRUCTED BY : COETZER & DE BEER ATTORNEYS

COUNSEL FOR RESPONDENT : MR J MOOLMAN

INSTRUCTED BY : STEWART MARITZ BASSON INC
DATE OF HEARING : 25th JUNE 2020
DATE OF JUDGEMENT : 28th July 2020